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No. 00-1376

IN THE

Supreme Court of the United States

CARL GENE COLLINS and ROBERT W. PEUFFIER,

Petitioners,

v.

MACMILLAN-BLOEDEL, INC.; JOHN CRANE CO., INC.; and OWENS-ILLINOIS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT OWENS-ILLINOIS, INC.

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QUESTION PRESENTED FOR REVIEW

When a case is transferred for coordinated or consolidated pretrial proceedings under the multidistrict litigation statute, 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation must remand it to the original district "at or before the conclusion of such pretrial proceedings" (unless the case is resolved in the transferee district). The statute also expressly permits the Panel to "separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded." If the Panel declines to remand a case upon request, Section 1407(e) makes its decision reviewable, but only by extraordinary writ under 28 U.S.C. § 1651. Here, the Panel remanded claims brought by the authorized representatives of the Petitioners' estates, but separated the punitive damage claims in those cases, on the ground that pretrial proceedings had not concluded with respect to such claims. The Third Circuit declined to issue a writ of mandamus. The questions presented on the Petition for Writ of Certiorari ("Petition") are

(1) whether the Petition should be dismissed because the named Petitioners died before the Petition was filed and the representatives of the Petitioners' estates waived any right to request review; and

(2) if the Petition is not dismissed, whether the Court of Appeals abused its discretion in denying mandamus, when

(a) the premise for the mandamus petition, that MDL 875 as a whole encompasses no legitimate multidistrict activity and is a failure, is demonstrably false; and

(b) the Petitioners' assertion that the Panel lacks the authority to sever punitive damages claims has no legal basis.

LIST OF PARTIES AND RULE 29.6 STATEMENT

There is no proper petitioner before the Court. The Petition names two petitioners, Carl Gene Collins and Robert W. Peuffier (the "Petitioners"). Neither Mr. Collins nor Mr. Peuffier was a party to the mandamus proceedings below. Indeed, both Petitioners died before the proceedings in the Third Circuit, and so could not be proper parties either there or before this Court.

The petitioners in the mandamus proceedings below (the "Mandamus Petitioners") were Mary Nell Collins ("Mrs. Collins," the personal representative of the estate of Mr. Collins), Marjorie Peuffier ("Mrs. Peuffier," the personal representative of the estate of Mr. Peuffier), and Barbara and Frederick Hoffman ("Mr. and Mrs. Hoffman;" Mr. and Mrs. Hoffman have apparently now dropped out of the proceedings). Mrs. Collins and Mrs. Peuffier cannot now join the Petition as petitioners because Supreme Court Rule 35.1 allows the representative of a deceased party to join a cert. petition by substitution only "[i]f a party dies *after* the filing of a petition for a writ of certiorari." (Emphasis added.)

Nor may Mrs. Collins and Mrs. Peuffier seek relief in this Court on any other basis. Supreme Court Rule 12.6 provides that "[a]ll parties to the proceedings in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court;" that "[a]ll parties other than the petitioner are deemed respondents;" and that "any respondent who supports the position of a petitioner" may file "a response supporting the petition," but such a response "shall be filed within 20 days after the case is placed on the docket, and that time will not be extended." Under Rule 12.6, Mrs. Collins and Mrs. Peuffier (as parties below

and not petitioners here) are deemed respondents, whose response supporting the Petition, if any, was due 20 days after the Petition was filed. They submitted no such response and therefore, under Rule 12.6's express terms, they "will not qualify for any relief from this Court."

The Petition is also flawed in its identification of the respondents. Under Supreme Court Rule 12.6, all parties in the proceeding below are respondents in this Court. The respondents in the mandamus proceeding below were (1) numerous defendants collectively represented by the Center for Claims Resolution ("CCR"); (2) GAF Corporation; and (3) MacMillan-Bloedel, Inc. Additionally, Owens-Illinois, Inc. (which had once been a defendant in the *Collins* and *Peuffier* cases, but had resolved them) appeared as an amicus curiae. *See* Petition, App. 1. The Petition is strikingly out of sync with the proceedings below. It names as Respondents Owens-Illinois (only an amicus below), John Crane Co., Inc. (not a party below), and MacMillan-Bloedel, Inc. (the only proper Respondent named[1]). The Petitioners neither named nor served the CCR respondents (the principal respondents below) or GAF (which is now in bankruptcy).

Although Owens-Illinois, as an amicus below, is not properly designated a respondent, it makes the following disclosure. Owens-Illinois is a publicly-held corporation. The following entities hold 10% or more of Owens-Illinois stock: KKR Associates, L.P. (23.1%); FMR Corp. (11.3%). Shares shown as owned by KKR Associates, L.P. are owned of record by three limited partnerships of which KKR Associates, L.P. is the sole general partner and as to which it

1. Owens-Illinois hereby joins the brief in opposition filed by MacMillan-Bloedel.

possesses sole voting and investment power. Owens-Illinois has received a Schedule 13G filed by FMR Corp., Edward C. Johnson 3d, Abigail P. Johnson and Fidelity Management & Research Company with respect to the shares of Common Stock identified as owned as of December 31, 1998 and in which such reporting persons assert dispositive and/or voting power with respect to portions of or all of such shares as a result of their direct or indirect investment advisory relationship to, or ownership interest in, various investment companies, institutional accounts or investment advisors which own such shares.

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ceased individuals whose representatives are not before the Court requesting relief. For these reasons MacMillan disputes that this Court has jurisdiction over the matter and asks that the writ be dismissed.

STATEMENT OF THE CASE

The Petition for Writ of Certiorari should be denied because the proper parties have not sought relief and because the Third Circuit Court of Appeals correctly held that Mary Nell Collins and Marjorie Peuffier failed to meet the burden necessary for mandamus to issue. The Petitioner with claims related to MacMillan is Carl Gene Collins, the deceased husband of Mary Nell Collins, who allegedly sustained injury due to exposure to asbestos-containing products. Mary Nell Collins, individually and as personal representative of her husband's estate, is pursuing the underlying claims against MacMillan. Until recently, the entirety of Ms. Collins' claims were pending in the Eastern District of Pennsylvania ("MDL court" or "transferee court"). Upon motion for remand by Ms. Collins, the MDL court severed her punitive damage claim and recommended that all of her compensatory damage claims be remanded. The Judicial Panel on Multidistrict Litigation ("Panel") followed the MDL's court's suggestion and entered an order reflecting the decision, remanding non-punitive claims to the Northern District of Texas ("transferor court"). Ms. Collins moved the Panel to remand the punitive damages claim. MacMillan opposed remand of the punitive damage claims and all other claims, and filed a Motion to Vacate Conditional Remand Order and Brief. After oral argument on both parties' motions, the Panel denied Ms. Collins' motion to remand the punitive damage claim and remanded all non-punitive claims. Ms.

Collins filed a Petition for Writ of Mandamus in the Third Circuit Court of Appeals, which was denied. 233 F.3d 809; *see* Pet., Appendix ("App.") A. Subsequently, the deceased Carl Gene Collins and Robert W. Peuffier filed the Petition. MacMillan files this Brief in Opposition urging the Court to deny the Petition for Writ of Certiorari because the Petitioners lack standing and because the Panel acted properly in refusing to order the Panel to remand Ms. Collins' punitive damage claim.

REASONS FOR DENYING THE WRIT

A. Petitioners Do Not Have Standing to File Petition.

Petitioners are deceased and do not have standing to request relief from this Court. *See* SUP. CT. R. 12.6, 35.1, FED. R. CIV. P. 25. The parties who are plaintiffs in the trial court action and who were petitioners at the appellate court level are the representatives of the estates of Petitioners. They are not before the Court requesting relief. Since the petitioners are deceased and the estate representatives are absent from this proceeding, the Court should not hear the issues presented by Messrs. Collins and Peuffier.

B. There Are No Compelling Reasons for this Court to Review.

Petitioners have shown no compelling reason why this Court should grant their Petition. SUP. CT. R. 10. Neither the courts of appeal, the state courts of last resort nor the MDL regimes are in conflict. No important federal question is at issue. No court has departed from the usual course of proceedings. This appeal boils down to Petitioners' assertion

that the words "issue" and "claim" were incorrectly interpreted. Such a matter is hardly worthy of review by this Court.

C. The Judicial Panel's Action was Within Its Discretion.

As the Third Circuit Court of Appeals pointed out, "Congress intended transferee courts to have broad pretrial authority." *In Re Patenaude*, 210 F.3d 135, 144 (3d Cir. 2000). The language of the MDL statute provides broad discretion to the Panel by stating that orders will not be reviewed except by extraordinary writ. 28 U.S.C. § 1407(e); *see* Pet. at App. 10. Because of the high burden Congress chose to require, orders should only be reviewed in the event of "an act amounting to a judicial usurpation of power." *Patenaude* at 140.

The severance and retention of the claim for punitive damages in the MDL is within the broad authority and discretion of the Panel. Petitioners have failed to show that the Panel's action rose to the level of a usurpation of power.

D. Petitioners Have Failed to Establish a Right to a Mandamus Under Any Standard.

Petitioners' argument that the Third Circuit applied an incorrect rubric in evaluating the mandamus is inconsequential. Under any evaluation, whether statutory or common law, Petitioners have failed to establish the need for such an extraordinary writ. The Petition fails to do so, as did the appeal to the Third Circuit Court of Appeals.

Petitioners claim that a right to mandamus exists because of a "mistake" by the Panel in failing to exercise a "statutory

duty" to remand the punitive damage claim. Pet. at 3. However, no statutory duty to remand such a claim exists. As discussed in detail below, the Panel acted properly in retaining the punitive damage claim in the MDL. There is therefore no "clear and indisputable" right to such a remand and thus no grounds for mandamus. *Patenaude* at 140.

Furthermore, Petitioners have failed to show that there are no other adequate means to obtain the desired relief. *Patenaude* at 140. The punitive damage claim has not been eliminated, merely severed and retained in the MDL. Petitioners therefore have an adequate avenue of recovery for that claim. Moreover, retention of the punitive damage claim serves the purposes of the Multiparty, Multiforum Acts of 1990 and 1991 upon which Petitioners rely; it guards against "the risk of inappropriate, multiple punitive damage awards." Pet. at 7, citing H.R. Rep. 101-515, H.R. Rep. No. 515, 101st Cong., 2nd Sess. (June 1, 1990) and H.R. Rep. 102-373, H.R. Rep. No. 373, 102nd Cong., 1st Sess. (Nov. 25, 1991).

Notwithstanding Petitioners' unsupported statement that the MDL "has . . . prevented the vast majority of . . . cases from reaching trial. . . ," Pet. at 1-2, the system has in fact been efficient. As of 1996, approximately 40,000 of the 62,000 cases assigned to MDL 875 had been resolved, and thousands of the remaining 22,000 cases had been resolved but not yet dismissed. *Patenaude* at 140. In 1997 and 1998, the MDL court closed nearly 10,000 cases per year. *Id.* These numbers demonstrate that MDL 875 provides an adequate alternate means of pursuing Collins' claim for punitive damages.

Petitioners also claim the MDL results in delay. Pet. at 1. Even assuming the allegations were true, Petitioners have not shown an immediate need for pursuing the punitive damage claim. By definition, punitive damages are intended to punish a defendant for its wrongful actions and to deter future misconduct, rather than to compensate the injured party. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Such damages may be a windfall to a fully compensated plaintiff. *Newport* at 267. One author endorsing separate trials for punitive and compensatory claims has stated:

> A plaintiff enjoys no individual entitlement to punitive damages commensurate with his right to be compensated for his injury. . . . [T]he trier of fact awards punitive damages not to compensate the plaintiff as an individual, but to punish the defendant and to protect society as a whole. Depriving an individual mass tort plaintiff of control over the prosecution of a punitive damage claim does not, therefore, significantly interfere with the traditional freedom accorded litigants in personal injury litigation.

R. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 846 (1985)(footnotes omitted). Therefore, even if there is a delay in pursuing the punitive damage claim, Petitioners will not be harmed or denied the opportunity to recover compensation. Moreover, the Panel's decision does not delay Petitioners from pursuing their compensatory claims; on the contrary, the Panel's decision hastens the determination of those claims.

Petitioners have likewise failed to address an additional burden required by the Panel. Specifically, a movant bears a heavy burden of persuasion absent a suggestion of remand from the Panel. J.P.M.L. Rule 7.6(d); *In re Air Crash Disaster in Ionian Sea*, 438 F.Supp. 932, 934 (Jud. Pan. Multi. Lit. 1977). In the pending action there is no suggestion of remand from the transferee court with respect to the punitive damage claim. In fact, the transferee court considered Collins' motion to remand punitive damages, and denied it. The Panel has recognized "the significance of the transferee judge's view, as the firsthand judicial observer." *In re Air Crash Disaster* at 934. MacMillan asks this Court to consider the view of Judge Weiner, who suggested the punitive damages claims be retained in MDL 875. Absent a suggestion of remand from him, Petitioners bear a heavy burden of persuasion, which they have failed to meet.

E. The Judicial Panel Acted Properly in Retaining the Claims for Punitive Damages Pursuant to the Controlling Statute and the Federal Rules of Civil Procedure.

Petitioners argue that the Panel has no statutory authority under 28 U.S.C. § 1407 to retain punitive damage claims in the MDL because they are "issues" rather than "claims" Pet. at 4-11. In doing so, Petitioners resort to verbal gymnastics to fashion a confusing and awkward "plain meaning" of the word "claim" which does not include claims for punitive damages. Petitioners' convoluted argument is essentially that since a punitive damage prayer is an "issue" and the word "issue" is not listed in the statute, the Panel acted in violation of the plain meaning of § 1407. The Third Circuit Court of Appeals disagreed with Petitioners' contrived defi-

nition and found that "claim" did encompass punitive damages. 233 F.3d 809; *see* Pet. at App. 4.

This Court need not even reach the issue of classifying punitive damages as an "issue" or a "claim." The only action of the Panel which is up for review is the remand of Petitioners' compensatory claims. It was Judge Weiner of the MDL court, rather than the Panel, who severed the punitive damages claims from the other claims in the case. Pursuant to FED. R. CIV. P. 42(b), Judge Weiner did not exceed his authority, nor do Petitioners so claim. FED. R. CIV. P. 42(b) (granting district courts authority to "order a separate trial of any claim . . . or of any separate issue . . . ."). The Panel merely ordered the remand of the compensatory claims, retaining the remainder of the action in the MDL. The plain language of § 1407 clearly authorizes the Panel to remand "any claim" prior to the remand of "remainder of the action." 28 U.S.C. § 1407(a). Even Petitioners do not contend that the compensatory claims which were remanded do not qualify as "claims." Thus the Panel's remand of the compensatory claims conforms to the "plain language" of § 1407 upon which Petitioners base their argument. The severance by Judge Weiner and the remand by the Panel are consistent with the plain language of § 1407(a) and are appropriate pursuant to FED. R. CIV. P. 42(b). Petitioners have failed to show that any action of the Panel was contrary to the statute, much less a judicial usurpation of power.

MacMillan must nevertheless respond to the hairsplitting argument that punitive damages are only an "issue" and not a "claim." Petitioners' argument ignores the fact that punitive damages have the features of "claims" rather than "issues." A claim for punitive damages requires independent elements

of proof and the possibility of a heightened burden of proof. *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565, 1580 (6th Cir. 1985) (quoting Owens, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1269-71 (1976)); *see also Bright v. Land O'Lakes, Inc.*, 844 F.2d 436, 439 (7th Cir. 1988). Punitive damages may be tried separately from other claims in a case and before separate juries. *E.g., Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 599-600 (4th Cir. 1996); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 474 (5th Cir. 1986); *Scheufler v. General Host Corp.*, 895 F.Supp. 1411, 1413-15 (D. Kan. 1995); *Denesha v. Farmers Ins. Exch.*, 161 F.3d 491, 505 (8th Cir. 1998); *Jannotta v. Subway Sandwich Shops, Inc.*, 125 F.3d 503, 517 (7th Cir. 1997); *Central Office Tel., Inc. v. AT&T*, 108 F.3d 981, 994 (9th Cir. 1997), *rev'd on other grounds*, 118 S.Ct. 1956 (1998). These features of punitive damages render them analogous to "claims" rather than "issues." Furthermore, isolated references to punitive damages as "issues" do not exclude them from the plain meaning of the word "claim." Such references are simply irrelevant to the statute at issue because the terms "issue" and "claim" are not mutually exclusive. Of far greater significance is the fact that Petitioners cite no cases or literature excluding punitive damages from the definition of "claim."

Petitioners assert that punitive damage claims are not "claims" under § 1407 because they are not a separate cause of action for which a plaintiff may sue. Pet. at 7-9. This argument fails because many types of claims exist which may not be sued on separately. One example, a loss of consortium claim, has been described as a "dependent claim based on liability to the injured spouse. . . ." *Doe v. Nevada Crossing, Inc.*, 920 F.Supp. 164, 169, n.5 (D. Utah 1996)

(citing *Madison v. Deseret Livestock Co.*, 574 F.2d 1027 (10th Cir. 1978)). Though it is derivative of a spouse's substantive claims, a loss of consortium claim is a separate and distinct claim for relief. *Id.*; *see also Curato v. Saluti*, 2000 WL 1974 at *8 (E.D. Pa. Dec. 30, 1999). A leading treatise on punitive damages has similarly described punitive claims as dependent claims for relief:

> [T]he weight of authority is that punitive damages do not constitute an independent cause of action. Punitive damages are awarded 'incident to' a basic cause of action.... [W]hile punitive damages, under the general rule, do not constitute an independent claim which can be pleaded and proved alone, authority supports the conclusion that such damages constitute a dependent *claim* for relief which must be supported by independent allegations and proof.

James D. Ghiardi, *et al., Punitive Damages: Law & Practice* § 12.07 at 22-23, 25 (1999) (citing authorities) (emphasis added). Therefore, the Panel's order to remand all claims except Petitioners' dependent claims for punitive damages is fully consistent with the plain meaning of the term "claim" in § 1407(a). Since the Panel's actions were proper pursuant to the statute, there was no judicial usurpation of authority warranting mandamus.

F. Policy Consideration Support Denying the Writ.

Even if Ms. Collins and Ms. Peuffier had met the burden required for mandamus, policy considerations dictate that the writ of mandamus should not have issued. The *Patenaude* court held that: "[I]t is within a court's discretion to refrain

from issuing the writ even when the requirements for mandamus are technically satisfied. The availability of the writ does not compel its exercise." *Patenaude* at 141 (quoting *In re Chambers Dev. Co.*, 148 F.3d at 223); *see also Hahnemann v. Edgar*, 74 F.3d 456, 461 (3d Cir. 1996); *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 482 (3d Cir. 1995); *Lusardi v. Lechner*, 855 F.2d 1062, 1070 (3d Cir. 1998). In the instant case, ample policy reasons justified the Third Circuit Court of Appeals' use of its discretion to deny the writ regardless of whether Petitioners met their burden.

It is the policy of the MDL court for punitive damages claims to remain in MDL 875 until it is clear that other claimants will not be harmed by their adjudication. This conserves monetary resources for those claimants who have not yet had their day in court. The Panel described the policy when it issued its order establishing MDL 875 in 1991. It cited the concern that there may be "insufficient funds to fairly compensate all deserving claimants," and suggested that the concern be addressed before plaintiffs "go to trial and secure recoveries (often including punitive damages) at the possible expense of deserving plaintiffs in other cases. *In re Asbestos Products Liability Litigation (No. IV)*, 771 F.Supp. 415, 422 (Jud. Pan. Multi. Lit. 1991). As a possible solution, the Panel suggested that some claims could be remanded in advance of others at the suggestion of the MDL court. *Id.*

Judge Weiner touched upon such policy issues when he expressed the MDL court's "concern over the continued viability of the defendants, particularly with an unknown quantity of future injuries brought about due to the latency of asbestos-related diseases. The loss of any defendant to bank-

ruptcy shifts a greater burden to the remaining defendants." *In re Asbestos Prods. Liab. Litig. (No. VI)*, MDL No. 875, 1996 WL 539589 (E.D. Pa. Sept. 16, 1996) (footnote omitted). Similarly, Judge Weis of the Third Court of Appeals described the situation in 1993, when he stated that "the available resources of asbestos manufacturers will be exhausted before all deserving claimants have received their compensatory damages." *Dunn v. Hovic*, 1 F.3d 1371, 1399 (3d Cir. 1993) (*en banc*) (Weis, J., dissenting) (footnote omitted).

Petitioners would have the Court grant them special dispensation at the expense of thousands of other MDL claimants. Due to the large volume of asbestos cases and the growing number of bankrupt defendants, providing compensatory damages to claimants is becoming increasingly difficult. For example, in a recent Texas Supreme Court case, two of three defendant companies, Pittsburgh Corning and Owens-Corning, filed for bankruptcy following oral argument and submission of the case. *Pustejovsky v. Rapid-American Corp.*, 35 S.W.3d 643, 645 (Tex. 2000). Severing and deferring punitive claims until compensatory claims are satisfied is even more important now than when the policy was first addressed. Mandamus is hardly the appropriate vehicle for overriding established policy considerations and achieving such special treatment.

The Panel's practice of remanding non-punitive claims that are severed by Judge Weiner while retaining punitive claims is additionally consistent with the policy of § 1407(a). The Panel is prevented from dividing a single claim between two courts because it "violates well settled principles of judicial management." Dividing a single claim among two

courts could lead to confusion and conflicting rulings by those courts. *In re Plumbing Fixtures Cases*, 298 F.Supp. 484, 495 (Jud. Pan. Multi. Lit. 1968).

Severing and retaining punitive damages in MDL 875 does not raise such concerns. Under the Panel's order, a single claim for relief is not split between two courts; rather, the claim for punitive damages is separated from the compensatory claims. The punitive claim will not be pursued without appropriate findings of liability in the trial court. As discussed previously, federal courts have repeatedly found it permissible to try punitive damages claims to separate juries. Therefore, there is no risk of inconsistent rulings by two district courts.

The practice of severing and retaining punitive damage claims in the MDL promotes the above policies. The Third Court of Appeals' denial of the writ of mandamus was appropriate. Therefore, the Petition for Writ of Certiorari sought by Petitioners should be denied, regardless of whether this Court finds that Petitioners' estates' representatives met their heavy burden of persuasion.

CONCLUSION

Carl Gene Collins and Robert W. Peuffier are deceased, and the proper parties are not seeking relief from this Court. Furthermore, the issue presented does not merit consideration by this Court. The standard for obtaining the extraordinary relief of mandamus is demanding. Petitioners, by resorting to a convoluted reading of 28 U.S.C. § 1407 and a strained definition of the word "claim," fall far short of that burden. Petitioners' right to the writ is not clear and indisputable because the Panel acted properly and within its discretion in remanding compensatory claims and retaining the punitive claims in MDL 875. The Panel's actions were in accord with statute, federal rules and policy considerations. The Petition for Writ of Certiorari should be denied because the Third Circuit Court of Appeals acted properly in denying the Petition for Writ of Mandamus.

Respectfully Submitted,

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